(1) Supreme Court, U.S.
FILED
00-526 OCT 6 2000
OFFICE OF THE CLERK

No. 00-

IN THE

Supreme Court of the United States

GEHAD GABER TAWFIK,

Petitioner,

v.

JANET RENO, United States Attorney General,
IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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37 pp

QUESTION PRESENTED

Whether the Board of Immigration Appeals may lawfully deny a Motion to Reopen deportation proceedings when the denial of the Motion to Reopen by the agency is predicated upon an error of law regarding Petitioner's statutory eligibility for the underlying relief sought in the Motion to Reopen.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The Eleventh Circuit panel opinion is not reported. *See Tawfik v. Reno*, No. 98-9058 (11th Cir. Apr. 13, 2000) (Appendix A). The Board of Immigration Appeals Opinion was not published. *In re Tawfik*, No. A28 659 532 (BIA Aug. 7, 1998) (Appendix B). The Immigration Judge's decision is reproduced herein. *In re Tawfik*, No. A28 659 532 (IJ Apr. 18, 1996) (Appendix C). The Eleventh Circuit opinion *en banc* is not reported. *See Tawfik v. Reno*, No. 98-9058 (11th Cir. July 13, 2000) (Appendix D).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The instant case requires application of § 245(a) of the Immigration & Nationality Act, 8 U.S.C. § 1255(a). This section states:

> (a) The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is

> eligible to receive an immigrant visa and is admissible to the United States, and (3) an immigrant visa is immediately available to him at the time his application for permanent residence is filed.

The law as it appeared at this case's inception prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, hereinafter referred to as "I.I.R.A.I.R.A. 96," Pub. L. No. 104-208, 110 Stat. 3009 (1996) read, as follows:

> (i) The Attorney General may, in his discretion, waive application of clause (i) of subsection (a)(6)(C) —
>
> > (1) in the case of an alien who is the spouse, parent, or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, or
> >
> > (2) if the fraud or misrepresentation occurred at least 10 years before the date of the alien's application for a visa, entry or adjustment of status and it is established to the satisfaction of the Attorney General that the admission to the United States of such alien would not be contrary to the national welfare, safety or security of the United States.

8 U.S.C. § 1182(i), amended by 8 U.S.C. § 1182(i)(1990).

Section 349 of The I.I.R.A.I.R.A. 96 changed this provision. It currently reads:

> (i)(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) of this section in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

8 U.S.C. § 1182(i)(1999).

STATEMENT OF THE CASE

A. Facts Leading to the Deportation Proceedings:

Petitioner Gehad Gaber Tawfik is a 37 year-old citizen of Egypt. Petitioner first came to the United States as a visitor seeking medical treatment in 1988. Since living in the United States, Petitioner has become a successful businessman and developer. His company, GT Architecture, currently employs more than thirty United States Citizens.

Petitioner obtained conditional permanent residence on September 20, 1989 based upon his first marriage to a United States Citizen, Ms. Cheryl Webb. Due to the fact that Petitioner and his first wife had been married less than two years at the time he received his additional grant of legal permanent residence, he and his then United States Citizen

wife Cheryl timely filed with the I.N.S. a joint petition to remove the conditional nature of Petitioner's lawful permanent residence using I.N.S. Form I-751.

Petitioner admits that he misrepresented on Form I-751 the fact that he was no longer living with and was divorced from Cheryl Webb. The joint petition was approved by the I.N.S. without a personal interview of Petitioner and Cheryl Webb. Accordingly, the conditional nature of Petitioner's permanent residency in the United States was removed, making him a legal permanent resident of the United States for all purposes. Petitioner later sought to become a citizen of the United States on December 1, 1994. His misrepresentation on his joint petition to remove the conditional nature of his residency was discovered by an I.N.S. officer when Petitioner truthfully revealed on his naturalization application that he was divorced from Cheryl Webb. The I.N.S. officer decided to request a copy of the divorce decree before rendering a decision on Petitioner's citizenship application. The discovery of his divorce date led to the deportation proceedings which are now the subject of this Petition for Writ of Certiorari.

Mr. Tawfik remarried a second United States Citizen, his wife Valerie Ann Tawfik on January 20, 1996. Petitioner and Valerie Ann Tawfik are now the proud parents of two children who were both born in the United States, and like their mother, know nothing of Egypt.

B. Proceedings Below:

On April 18, 1996, an Immigration Judge ordered the deportation from the United States of Gehad Tawfik, a citizen of Egypt. The Immigration Judge found Petitioner to be statutorily ineligible for any relief from deportation. At the time,

Petitioner did not have an approved petition based upon his second marriage to a United States Citizen. Petitioner timely appealed his deportation order to the Board of Immigration Appeals. Valerie Anne Tawfik, Petitioner's present wife, filed an immediate relative petition on or about March 14, 1996 seeking to classify Petitioner as her good faith husband under 8 U.S.C. § 1151(b) (1990). She filed this "spouse petition" as required by regulations and procedure with a separate branch of the prosecuting I.N.S. prior to the completion of the final hearing in deportation proceedings. A.R. 39.

Due to administrative delay in I.N.S. adjudications, this "spouse petition" was not approved by the I.N.S.'s adjudication branch until September 9, 1996 — long after the date of the completion of deportation proceedings. A.R. 17. This approved spouse petition by his United States Citizen wife made it possible, foreseeable and necessary for Petitioner to file his Motion to Reopen to request a hearing *on the merits* of his legal permanent residence application. *See* A.R. 66 to 68. Once Valerie Tawfik's spouse Petition was approved, Mr. Tawfik through counsel proffered his application for legal permanent residence to the Board of Immigration Appeals with his Motion to Reopen on or about September 29, 1996. Had the Motion to Reopen been granted by the Board of Immigration Appeals, it would have insured Petitioner of an administrative hearing *on the merits* of his quest for legal permanent residence in the United States based upon his marriage to Valerie Tawfik, as well as an opportunity to be heard on any necessary waiver(s) for his misrepresentation necessary to render Petitioner admissible to the United States. Petitioner was denied the only form of relief sought, voluntary departure from the United States to process his visa application abroad without being deported, by the Immigration Judge. Appendix C.

Petitioner's timely appeal to the Board of Immigration Appeals was dismissed and the Motion to Reopen was denied simultaneously by the Board of Immigration Appeals on August 7, 1998. *See* Appendix B. A timely Petition to Review was filed in the Eleventh Circuit Court of Appeals on August 18, 1998. Despite the fact that neither Petitioner nor Respondent I.N.S. requested oral argument in their briefs[1], oral argument was scheduled by and held before the Eleventh Circuit Court of Appeals on March 16, 2000. On April 13, 2000 despite having recently heard oral argument at its own request, the Eleventh Circuit Court of Appeals panel issued an affirmance under 11th Cir. Rule 36-1[2]. Appendix A.

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1. The rules of the Eleventh Circuit Court of Appeals require both Appellant and Appellee to specify in their brief whether or not oral argument is requested. 11th Cir. R. 28-2(c).

2. The Eleventh Circuit Rule 36-1 states as follows:

> Affirmance Without Opinion. When the court determines that any of the following circumstances exist:
>
> (a) the judgment of the district court is based upon findings of fact that are not clearly erroneous;
>
> (b) the evidence in support of a jury verdict is sufficient;
>
> (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
>
> (d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
>
> (e) the judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

A timely petition for rehearing *en banc* to the Eleventh Circuit was filed on May 30, 2000. The petition for rehearing *en banc* was denied on July 11, 2000. Appendix D. The instant petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS DOES NOT FOLLOW CLEAR PRECEDENT OF THIS COURT REGARDING THE ROLE OF FEDERAL COURTS IN REVIEW OF AGENCY DECISIONS

In 1976, this Court held that the I.N.S. may "skip over" the question of statutory eligibility for the underlying relief sought in its lawful denial of a Motion to Reopen deportation proceedings. *I.N.S v. Bagamasbad*, 429 U.S. 24 (1976) (per curiam). In the case at bar, the Board of Immigration Appeals made a clear error of law by ruling that Petitioner was *per se* ineligible for the relief sought in his underlying Motion to Reopen — a question of statutory eligibility. The relief sought in this deportation case for which the Board held that Petitioner was ineligible for was adjustment of status to legal permanent resident status under 8 U.S.C. § 1255 (1999). Eligibility for this relief is based upon Petitioner's marriage to his wife Valerie Tawfik who was born and raised in the United States. In fact, the waiver provisions found at 8 U.S.C. § 1182(i)(1999) would, if granted, remove Petitioner from the legions of the "inadmissible" aliens seeking legal status in the United States The waiver would then allow Petitioner to remain with his family as a matter of administrative grace despite his prior misrepresentation to the I.N.S.

The Court of Appeals for the Eleventh Circuit ignored this proposition by ruling that the agency's decision was entered without a reversible error of law, or that the order of an administrative agency is supported by substantial evidence. *See* 11th Cir. Rule 36-1(e),(c). This is simply not true. The Eleventh Circuit's own precedent, *Bull v. I.N.S.*, 790 F.2d 869 (11th Cir. 1986), regarding its duty to reverse the Board's handling of a case of an inadmissible alien married to a United States Citizen commands a contrary conclusion from the lower court in the case *sub judice*. In both cases, the Board of Immigration Appeals erred in finding that Petitioner, and Mr. Bull respectively, are ineligible for adjustment of status to legal permanent residence. In *Bull v. I.N.S.*, 790 F.2d 869, the court of appeals reversed. In this case, the court of appeals affirmed without explaining its reasoning.

The Supreme Court has never ruled on the question of whether the I.N.S. may lawfully ***err*** on the question of statutory eligibility for the underlying relief sought in a Motion to Reopen, and then deny the Motion as a matter of discretion.

In other Federal administrative law cases, this Court has also held that the primary purpose of Federal Court review of Federal agency decisions is to correct agency rulings based upon erroneous determinations of law. Perhaps the most succinct articulation of this principle can be found as early as *S.E.C. v. Chenery Corp.*, 318 U.S. 80 (1943). This Court formulated the test as follows, "If the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law." *Chenery Corp.*, 318 U.S. at 94. The agency made a blatant misconception of the law

in this case by finding Petitioner to be *per se* ineligible for adjustment of status under 8 U.S.C. § 1255 (1999). This misconception of law should not be allowed to stand.

The substantive and procedural law regarding Motions to Reopen in deportation litigation has changed considerably since *Bagamasbad* when this Court held that the Board may lawfully "skip over" the question of statutory eligibility in a Motion to Reopen in immigration proceedings and deny the Motion to Reopen as a matter of discretion. The initial limitations on the use of Motions to Reopen in deportation proceedings occurred when the Attorney General by regulation[3] limited Motions to Reopen in deportation proceedings in timing and in number. Subsequently, Congress for the first time[4] recognized Motions to Reopen as an integral part of deportation litigation. Congress acquiesced in the Attorney General's previous numerical limitation of Motions to Reopen to one Motion to Reopen per case, and it adopted the Attorney General's strict time limitations on the filing of Motions to Reopen which must be filed within 90 days of the order of the Board of Immigration Appeals[5]. In other words, in the current era of deportation litigation, those aliens fighting deportation who may need to file a Motion to Reopen in deportation proceedings [as Petitioner did in this case] only get "one

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3. *See* 61 Fed. Reg. 18900-10 (1996).

4. 8 U.S.C. § 1229a(c)(6)(A)(1996) and 8 U.S.C. § 1229a(c)(6)(C)(i)(1996).

5. 8 U.S.C. § 1229a(c)(6)(A)(1996) and 8 U.S.C. § 1229a(c)(6)(C)(i)(1996).

bite at the apple" within 90 days of the agency's final decision[6].

This important limitation on the use of Motions to Reopen was not in existence at the time *Bagamsabad* or its progeny was decided[7]. If Motion to Reopens in deportation litigation are now limited in time and in number, then the decision whether to grant or deny the one and only permissible Motion to Reopen would logically have to be based upon the correct law regarding statutory eligibility for the underlying relief from deportation sought in the Motion.

The use by Petitioner's previous counsel of the one and only Motion to Reopen was necessitated by I.N.S.'s delay in adjudicating Valerie Tawfik's spouse petition, *see* A.R. 66 to 68, since Petitioner and Valerie Tawfik were already married at the time of the last hearing in deportation proceedings. Nevertheless, the agency's decision finding that Petitioner was *per se* ineligible for adjustment of status under 8 U.S.C. § 1255 was predicated upon a misconception of law. It is reasonable to infer that Congress would intend for the agency to construe the law correctly if the agency is to deny the one and only permissible Motion to Reopen in a deportation case. This principle would seem to be especially true if sole reason for Petitioner's use of the Motion to Reopen was the fact that the agency had already been presented with the question, but had not completed its

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6. *See* 61 Fed. Reg. 18900-10 (1996).

7. In *I.N.S. v. Doherty*, 502 U.S. 314, 315 (1992) this Court instructed that "There is no statutory provision for reopening, and the authority for such motions derives solely from regulations promulgated by the Attorney General." This is no longer true.

adjudication that Petitioner's marriage was bona fide. Yet neither the agency, nor the Court of Appeals on review, was willing to apply the law correctly below. This Court should.

II.

AFFIRMANCE OF THE DECISION OF THE COURT OF APPEALS CAN ONLY ENCOURAGE THE BOARD OF IMMIGRATION APPEALS TO AVOID DECIDING TROUBLESOME RETROACTIVITY ISSUES

Counsel for Petitioner theorizes that the Board below found Petitioner to be *per se* ineligible for adjustment of status to legal permanent residence under 8 U.S.C. § 1255 in order to avoid deciding a difficult question of the retroactivity of a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The issue raised by the Motion to Reopen by an alien who was clearly inadmissible for a prior misrepresentation to the I.N.S. was whether the change in the standard for obtaining a waiver embodied in Section 349 of the Illegal Immigrant and Immigrant Responsibility Act of 1996 is to be applied retroactively to Petitioner's pending case. The misrepresentation occurred prior to the change in the law. The law changed during Petitioner's deportation proceedings but prior to the Board of Immigration Appeals decision in this case. The thorny question before the Board was whether Petitioner was required to demonstrate to the Board as a threshold matter that denial of the waiver would result in "extreme hardship" to his United States Citizen wife and children, or whether the Board was to apply the old, more family unity oriented standard as articulated best in *Matter of Alonzo*, 17 I. & N. Dec. 292 (Comm'r 1979). The *Matter of Alonzo*, *supra*, administrative precedent recognized that

the material misrepresentation itself is the root of the problem and dictated that the misrepresentation itself is not to be calculated into the discretionary determination of whether or not to grant the waiver.

At the time Petitioner's case was decided by the Board of Immigration Appeals, the agency had not yet chosen to decide the retroactivity question described above in a precedent decision[8]. Nevertheless, while Petitioner's case was still pending before the United States Court of Appeals for the Eleventh Circuit, the issue of the whether Section 349 of "IIRIIRA96" should be applied retroactively to pending cases was squarely decided by the Board of Immigration Appeals in *Matter of Cervantes — Gonzalez*, __ I. & N. Dec. __, Int. Dec. 3380 (B.I.A. 1999). Unfortunately for Petitioner and for his United States-born immediate family, the court of appeals did not afford Petitioner a remand in order for the Board to issue a new decision in light of the Board's resolution of this issue.

The Board evidently chose to avoid deciding the retroactivity issue in Petitioner's case by erroneously finding Petitioner to be *per se* ineligible for the relief of adjustment of status to legal permanent resident. This finding was made despite Petitioner's classification by the I.N.S. in visa petition proceedings as the good faith spouse of a United States Citizen. Despite the Board's erroneous conclusion, Petitioner became prima facie eligible for consideration of the forgiveness under 8 U.S.C. § 1182(i) once the agency determined he had a genuine marriage to a United States

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8. The Board of Immigration Appeals may issue precedent decisions which are binding on employees of the United States Department of Justice. 8 C.F.R. § 3.1(g) (1999).

citizen (or legal permanent resident) spouse. Under the old law, Petitioner did not need to show anything other than the qualifying family relationship to be considered for the waiver. Under new Section 349 of "I.I.R.I.R.A.96," Petitioner would be required to make an additional showing of "extreme hardship" to Valerie Tawfik, and/or to his young children to qualify for relief. The Board deferred resolution of which standard to apply to pending cases for a later case. This omission by the Board was to the detriment of the Tawfik family.

The Court of Appeals in review flatly refused to correct the erroneous conclusion of law by the Board that Petitioner was *per se* ineligible for adjustment of status under 8 U.S.C. § 1255 despite his United States family ties.

This Court should exercise its supervisory powers by granting certiorari to prevent the Board and similarly situated Federal agencies from avoiding retroactivity questions which are couched in an erroneous determination of statutory eligibility. The Board of Immigration Appeals' legal responsibility is to apply the law of statutory eligibility for discretionary relief equally to all litigants when the case involves the one and only Motion to Reopen now allowed per deportation case. This principle should be reinforced with particular vigor in cases involving aliens who face the harsh outcome of extended periods of exile from their United States — born loved ones without ever having been heard on the merits of an application for agency forgiveness.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED APRIL 13, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-9058

I.N.S. No. A28-659-532

GEHAD GABER TAWFIK,

Petitioner,

versus

JANET RENO, United States Attorney General, IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

Petition fox Review of an Order of the
Immigration and Naturalization Service

(April 13, 2000)

Before CARNES, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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1. 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(Cont'd)

Appendix A

"Costs taxed against the petitioner."

Entered: April 13, 2000
For the Court: Thomas K. Kahn, Clerk
By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: JUL 27 2000

(Cont'd)

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B — DECISION OF THE BOARD OF IMMIGRATION APPEALS DATED AUGUST 7, 1998

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A28 659 532 - Atlanta Date: AUG 7 1998

In re: GEHAD GABER *TAWFIK*

IN DEPORTATION PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Gary C. Furin, Esquire

ON BEHALF OF SERVICE: Keith E. Hunsucker
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(A), I&N Act [8 U.S.C. § 1251(a)(1)(A)] — Excludable at entry under section 212(a)(6)(C), I&N Act [8 U.S.C. § 1182(a)(6)(C)] — Fraud or willful misrepresentation of material fact

APPLICATION: Voluntary departure; reopening

In an April 18, 1996, decision an Immigration Judge found the respondent deportable as charged, that he was statutorily ineligible for voluntary departure, and ordered him deported to his native country of Egypt (I.J. at 2, 4, 6). In a

timely appeal, the respondent asserted that the Immigration Judge "failed to consider the applicability of" a waiver of inadmissibility pursuant to section 212(h) of the Immigration and Nationality Act, mischaracterized as testimony misrepresentations made by him in a Form 1-751,[1] and did not allow him sufficient time to have a visa petition filed on his behalf adjudicated (Notice of Appeal; Respondent's Br.). In response, the Immigration and Naturalization Service asserts that the Immigration Judge properly found the respondent statutorily ineligible for voluntary departure as he admitted committing acts which constitute a crime involving moral turpitude (Service Br.).

Subsequently, in September of 1996, the respondent filed a motion to reopen seeking to pursue an application for adjustment of status based upon his marriage to a United States citizen. In support of his motion the respondent submitted evidence that he is the beneficiary of an approved visa petition, in addition to an application for adjustment of status. The Service opposes the respondent's motion, asserting that he is barred from admission to the United States due to his commission of a crime involving moral turpitude, and his submission of an application for adjustment falsely denying that fact.

I. APPEAL

The statutory criteria for eligibility for voluntary departure require that an alien show he is willing to leave the country, has the immediate means to depart, and has been a person of good moral character for at least 5 years preceding his

1. Joint Petition to Remove the Conditional Basis of Alien's Permanent Resident Status.

application. *See* section 244(e) of the Act; *Matter of Thomas*, Interim Decision 3245 (BIA 1995). If the statutory requirements are satisfied, the alien must additionally show that the requested relief is merited as a matter of administrative discretion. *Id.*

It is unclear from the record on what basis the Immigration Judge found the respondent statutorily barred from voluntary departure.[2] However, we find that the record supports a finding of a lack of good moral character. In June of 1991, the respondent certified under penalty of perjury in a Form I-751 that the marriage upon which his conditional residence had been obtained had not been judicially terminated (Exh. 2). Yet, at that time he was clearly aware that he had been legally divorced for more than a year (Exh. 2). The respondent does not contest the validity or the fact of his divorce, and has conceded that he made a "misrepresentation" on the application in question (Tr. at 17-18). Thus, as this occurred less than 5 years preceding his application for voluntary departure, we find that the Immigration Judge properly found that the respondent admitted committing acts which constitute the essential elements of a crime involving moral turpitude, specifically, perjury.[3] Sections

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2. While the respondent contends on appeal that the Immigration Judge held that he had given false testimony, the Immigration Judge specifically found otherwise (Notice of Appeal; I.J. at 5). Therefore, we shall not address the respondent's arguments in this regard.

3. Even absent this conclusion, the record supports a finding of a lack of good moral character in view of the respondent's clear employment of deception in an effort to obtain immigration benefits. *See generally* section 101(f) of the Act ("[t]he fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such a person is or was not of good moral character").

101(f)(3), 212(a)(2)(A)(i)(I) of the Act; *see also Matter of Hernandez-Uriarte*, 13 I&N Dec. 199 (BIA 1969); *Matter of Sloan*, 12 I&N Dec. 840 (BIA 1966).

Moreover, we find no support for the respondent's allegation that the Immigration Judge should have allowed "reasonable time" for the Service to adjudicate the visa petition filed on his behalf (Respondent's Br. at 2). The respondent asked for a period of 60-days of voluntary departure in order for the petition to be adjudicated (Tr. at 18). As the respondent was statutorily ineligible for the relief sought, the Immigration Judge committed no error in denying the same. Similarly, the respondent's vague reference to a waiver of inadmissibility pursuant to section 212(h) of the Act is irrelevant and need not be addressed as he has at no time submitted an application for such relief. Accordingly, the respondent's appeal will be dismissed.

II. MOTION TO REOPEN

In order to qualify for adjustment of status under section 245 of the Act, an alien must apply for adjustment, establish that he is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and show that an immigrant visa is immediately available to him at the time his application is filed. Section 245(a) of the Act. Given that the respondent has admitted committing acts which would constitute the essential elements of perjury, he is inadmissible. Section 212(a)(2)(A)(i)(1) of the Act. As such, he has failed to establish prima facie eligibility for adjustment of status, and reopening is not warranted. *See INS v. Doherty*, 502 U.S. 314, 323 (1992).

Furthermore, we would find that reopening is not warranted in the exercise of discretion. As noted, the respondent admitted making a material misrepresentation with regard to an earlier attempt to obtain adjustment of status. As such, the respondent is, or should be, well aware that he perjured himself in this regard, and that perjury is a crime involving moral turpitude.[4] Yet he again misrepresented the facts in completing his most recent application for adjustment of status, wherein he denied that he ever knowingly committed any crime of moral turpitude for which he had not been arrested. The respondent has resided in the United States for a short period of time, during the majority of which time he has been in deportation proceedings. The respondent's equities include his marriage to a United States citizen, lack of any criminal history, and United States citizen son. However, the equity of a marriage is diminished if the parties married, as here, after the commencement of deportation proceedings, with knowledge that the alien might be deported. *See Matter of Mendez*, Interim Decision 3272 (BIA 1996). In light of the respondent's demonstrated willingness to repeatedly provide false information when seeking to obtain immigration benefits, we find that a favorable exercise of discretion would not be warranted.

Accordingly, the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to reopen is denied.

s/ Fred W. Vacco
FOR THE BOARD

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4. Particularly as he was repeatedly given notice of these facts at his hearing (Tr. at 11, 15-18).

APPENDIX C — ORAL DECISION OF THE IMMIGRATION JUDGE DATED APRIL 18, 1996

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Atlanta, Georgia

File No.: A 28 659 532 April 18, 1996

In the Matter of	)	
	)	
GIHAD GILBERT TAWFIK	)	IN DEPORTATION
	)	PROCEEDINGS
	)	
Respondent	)	

CHARGE: Excludability at entry.

APPLICATIONS: Termination: voluntary departure.

ON BEHALF OF RESPONDENT:
Gary C. Ferrin, Esq.

ON BEHALF OF SERVICE:
Siu Wong, Esq.

ORAL DECISION OF THE IMMIGRATION JUDGE

This matter is before the Court as a result of an Order to Show Cause (Exhibit 1) in which respondent is charged with deportability on the above-stated ground. In earlier proceedings respondent has contested the charge; particularly [he] denied the truth of the allegation found in the latter

portion of paragraph 6 wherein it is alleged that on his joint petition to remove the conditional basis of his permanent resident status he stated that he was at the time of the filing of the petition still married and residing with this U.S. citizen spouse who had obtained the conditional status through her petition.

The Service, [which] has the burden of establishing deportability, has presented the form I-751, a petition which was submitted by respondent and the U.S. citizen spouse in question on June 20, 1991 (Exhibit 2). The joint petition was signed by both respondent and the U.S. citizen. It was signed by both under penalty of perjury, that condition being clearly set out in the document itself immediately above the signatures in question. A perusal of this document indicates that the answer given to question 4, which relates to whether or not the marriage in question has ever been annulled or judicially terminated, was indicated in the negative, as alleged by the INS in the Order to Show Cause.

The Service has also provided to the Court (Exhibit 2) a copy of the final judgment and decree of divorce which judicially terminated the marriage of respondent and the U.S. citizen in question on February 7, 1990. Therefore, respondent was on June 20, 1991[,] no longer married to that U.S. citizen, and by the presentation of the form I-751, both respondent and the U.S. citizen provided false information regarding the status of their marriage, which information was quite obviously well-known by both to be false, the two having been divorced for well over a year at the time.

Appendix C

In response to this evidence, counsel for respondent concedes that the allegation of the Order to Show Cause is correct. Based upon the evidence and respondent's concession, the Court determines that deportability is established by evidence which is clear, convincing[,] and unequivocal.

Respondent has designated his native country of Egypt as the country to which he prefers to be deported, should that be necessary. Respondent seeks to avoid any order of deportation by a request for voluntary departure. In particular, respondent cites the fact that he is now married to a second U.S. citizen who has filed a petition seeking a visa for him as a result of the marriage. That petition is at this time unadjudicated by the INS. Respondent seeks voluntary departure so that he may not compromise his ability to utilize any visa which results from that petition.

The INS through its counsel asserts that respondent is judicially ineligible for this form of relief, as a result of the operation of Section 101(f) (3) of the INA. This section establishes as statutorily ineligible to establish good moral character any individual who is described by the language of[,] inter alia[,] Section 212 (a) (2) (A) of the INA. The bar exists whether or not the individual is actually excludable. What is required is that the individual meet the description of the language in the section. The section in question describes any individual who has been convicted of or who admits having committed or who admits committing acts which constitute the essential elements of, inter alia, a crime of moral turpitude or an attempt or a conspiracy to commit any such crime. This language obtains unless and until what is called the "petty offense section" applies.

Appendix C

Counsel contends that respondent has admitted committing or at least admitted committing the essential elements of the crime of perjury. It is not questioned that perjury is a crime of moral turpitude. It is also a felony offense and[,] therefore, does not qualify as a petty offense. As a result, respondent is barred if he has admitted committing perjury or the essential elements of that offense. Counsel for the INS contends that by conceding the truth of the allegation and the substance of the evidence presented by the INS, respondent has in effect placed himself within the parameters of this language.

Since the submission of the at least partially fraudulent I-751 occurred on June 20, 1991[,] and because that is less than five years from this date, respondent is viewed as barred from establishing statutory eligibility for the requested form of relief. Voluntary departure requires statutorily that an individual be possessed of sufficient financial resources to remove himself from the United States at his own expense. It is also required that he show good moral character for not less than the five years preceding the grant of such relief. Since respondent's fraudulent document was submitted less than five years ago, he therefore would be statutorily barred.

The Court also notes that 101(f)(6) renders as barred any individual who provides false testimony for the purpose of obtaining any benefit under the INA. It has been established that false testimony does not apply where written documents are concerned. Oral testimony under oath is essential. In this case, there is no question but what respondent submitted the false application in an effort to obtain for himself the benefit under the INA. The document

itself, does not qualify, however, as false testimony. On the other hand, the Court is aware that the routine practice of the Immigration Service in processing such documents is to place the signatories to the joint petition under oath and interview them regarding the information provided in the form. If respondent was in this fashion placed under oath, and if in the course of that interview he reiterated the truth of the assertion that his marriage to the U.S. citizen had not been terminated, as he alleged in writing, then he would by that act render himself barred. There has been no evidence in this case to establish that such oral testimony was provided. If it did not occur, it would represent a deviation from routine practice by the INS examiners in dealing with a form I-751. However, in the absence of evidence on the point, the Court is without a basis to make an explicit finding on this ground.

With regard to the document, however, there is no question respondent did submit information which he knew to be false in written form, and did so under penalty of perjury. In the absence of authority presented to the Court to the contrary, the Court can only conclude that by his act and by the establishment [of the act] through the evidence which is conceded, he thereby placed himself in the category of individuals described in Section 212(a)(2)(A)(i)(I) of the INA, and[,] therefore, is statutorily ineligible for the form of relief now sought. There is no other relief known to exist or asserted in this case.

Accordingly, after review of the entire record in this cause, it is upon due consideration thereof:

Appendix C

ORDERED that respondent's request for voluntary departure be and the same is hereby mandatorily denied. And it is further:

ORDERED that respondent is to be deported from the United States to his designated country of Egypt on the charge contained in the Order to Show Cause.

Done and ordered this 18th day of April, 1996 at Atlanta, Georgia.

s/ G. MacKenzie Rast
G. MacKENZIE RAST
Immigration Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 13, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-9058

GEHAD GABER TAWFIK,

Petitioner,

versus

JANET RENO, United States Attorney General, IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____ F.2d _____).

Before: CARNES, BARKETT and WILSON, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the

Appendix D

Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
JAN 5 2001

(2)

No. 00-526

In the Supreme Court of the United States

GEHAD GABER TAWFIK, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, AND IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals erred in denying petitioner's motion to reopen on the ground that he had twice provided the government false information in his efforts to avoid deportation.

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In the Supreme Court of the United States

No. 00-526

GEHAD GABER TAWFIK, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, AND IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 213 F.3d 646 (Table). The decisions of the Board of Immigration Appeals (Pet. App. 3a-7a) and the immigration judge (Pet. App. 8a-13a) are unreported.

JURISDICTION

The court of appeals entered its order on April 13, 2000. A petition for rehearing was denied on July 13, 2000 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on October 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Egypt. Pet. 3; Pet App. 3a. In September 1989, petitioner became a conditional lawful permanent resident of the United States based on his marriage to Cheryl Webb, a United States citizen. Pet. 3. Five months later, petitioner and his wife were divorced. Pet. App. 9a. Nevertheless, in July 1991, petitioner petitioned the Immigration and Naturalization Service (INS) to remove the conditional basis of his lawful permanent resident status. In the documents he filed with the INS, petitioner represented, under penalty of perjury, that he and Ms. Webb were still married. *Ibid.* The INS subsequently approved the petition. Pet. 4.

When petitioner filed for naturalization, the INS discovered petitioner's falsehood and placed him in deportation proceedings. Pet. 4. Petitioner conceded deportability and requested a discretionary grant of voluntary departure in lieu of deportation. The immigration judge denied voluntary departure. Pet. App. 8a-13a. The immigration judge reasoned (*id.* at 11a) that petitioner's false representation to the INS about his marital status rendered him ineligible for voluntary departure because only persons "of good moral character for at least five years immediately preceding [the] application," 8 U.S.C. 1254(e)(1), are eligible for voluntary departure. See also 8 U.S.C. 1101(f)(3), 1182(a)(2)(A) (1994 & Supp. II 1996). The immigration judge found that petitioner had admitted committing the essential elements of perjury on his application for permanent legal resident status in July 1991 and that perjury was a crime of moral turpitude that precluded finding him to be a person of "good moral character" eligible for voluntary departure. Pet. App. 11a-12a.

2. Petitioner appealed to the Board of Immigration Appeals (Board). While that appeal was pending, petitioner submitted a new application for adjustment of status to conditional lawful permanent resident on the basis of his recent marriage to another United States citizen. On that application, petitioner stated, under penalty of perjury, that he had never knowingly committed any crime of moral turpitude for which he had not been arrested. Pet. App. 4a, 7a. Petitioner then filed a motion to reopen with the Board, seeking vacatur of the immigration judge's decision and a remand for consideration of his new application for conditional permanent resident status. *Id.* at 4a.

The Board affirmed the decision of the immigration judge and denied the motion to reopen. Pet. App. 3a-7a. The Board agreed with the immigration judge's ruling that petitioner's false representation about the status of his first marriage rendered him statutorily ineligible for a grant of voluntary departure. *Id.* at 4a-6a. The Board also rejected petitioner's argument that the immigration judge should have considered a waiver of inadmissibility, under 8 U.S.C. 1182(h), because petitioner had never applied for such relief. Pet. App. 6a.

The Board denied the motion to reopen on two grounds. First, the Board ruled that reopening was not warranted because petitioner's concealment of his divorce from his first wife rendered him inadmissible to the United States, and thus prima facie ineligible for an adjustment of status. Pet. App. 6a. Second, the Board ruled that it would not in any event grant reopening as a matter of discretion, because petitioner had "again misrepresented the facts in completing his most recent application for adjustment of status, wherein he denied that he ever knowingly committed any crime of moral turpitude for which he had not been arrested." *Id.* at

7a. The Board reasoned that petitioner's "demonstrated willingness to repeatedly provide false information when seeking to obtain immigration benefits" outweighed the limited equities in petitioner's favor that arose from his marriage, which occurred "after the commencement of deportation proceedings, with knowledge that the alien might be deported." *Ibid.*

4. The court of appeals affirmed the Board's decision without opinion. Pet. App. 1a-2a.

ARGUMENT

1. Petitioner contends (Pet. 7-11) that this Court should grant review because the Board erred in declaring him statutorily ineligible for adjustment of status and denying his motion to reopen on that basis. That claim does not merit review.

First, petitioner's argument is incorrect. Petitioner does not dispute that he made false representations to the INS, under oath, both on his initial application for adjustment of status based on his defunct first marriage and on his subsequent application for conditional permanent legal resident status based on his second marriage. See also Pet. App. 5a n.3 (record shows petitioner's "clear employment of deception in an effort to obtain immigration benefits"). Because petitioner's admitted behavior establishes the "essential elements" of perjury, the Board correctly concluded that petitioner was inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I), and thus statutorily ineligible for an adjustment of status. See 8 U.S.C. 1255(a) (alien must be admissible to be considered for adjustment).

Second, petitioner's argument that his inadmissibility could have been waived under 8 U.S.C. 1182(i) (1994 & Supp. II 1996) was not presented to either the immigration judge or the Board. Cf. Pet. App. 6a (rejecting

"vague reference" to waiver under a different statutory provision because petitioner never applied for such relief). Furthermore, that waiver provision applies only to findings of inadmissibility based on the misrepresentations identified in 8 U.S.C. 1182(a)(6)(C) (1994 & Supp. II 1996). Petitioner was not found inadmissible under that provision. He was found inadmissible on the ground that he admitted the essential elements of a crime of moral turpitude, under subsection (a)(2)(A)(i)(I). The waiver provision is thus inapplicable to petitioner's case.[1]

Third, the Board made clear that, even were petitioner statutorily eligible for adjustment of status, it would deny reopening in the exercise of its discretion. The Board found that petitioner's second incident of false representation—when he denied his prior commission of perjury in his current application for adjustment of status—made a discretionary denial of reopening appropriate. Thus, even if legal error occurred in denying reopening based on petitioner's ineligibility for adjustment of status, the court of appeals' judgment affirming the denial of reopening remains correct because the Board acted well within its discretion in ruling that petitioner's repeated falsehoods outweighed the limited equities in favor of reopening. See *INS* v. *Rios-Pineda*, 471 U.S. 444, 449 (1985) (INS has "broad discretion" to grant or deny motions to reopen, and "if

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[1] Petitioner's reliance (Pet. 8) on *Bull* v. *INS*, 790 F.2d 869 (11th Cir. 1986), is misplaced. The alien in *Bull*, unlike petitioner, had specifically requested consideration of waiver before the immigration judge and the Board. See *id.* at 873 n.3. Nor did the alien's crime of moral turpitude in *Bull* (passing a bad check) occur in the course of attempting to obtain immigration benefits, as petitioner's did. In any event, an alleged intra-circuit conflict does not warrant this Court's review.

the Attorney General decides that relief should be denied as a matter of discretion," statutory eligibility requirements need not be considered); *INS* v. *Bagamasbad*, 429 U.S. 24, 26 (1976) (per curiam) (Board or immigration judge may deny applications in the exercise of discretion without addressing statutory eligibility questions).

2. Petitioner also contends (Pet. 11-13) that this Court should exercise its supervisory power because petitioner "theorizes" (Pet. 11) that the Board found him statutorily ineligible for adjustment of status so that it could avoid addressing the retroactivity of Section 349 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009-639. That amendment makes it more difficult for aliens to establish their eligibility for waiver of inadmissibility based on prior misrepresentations. The Board's failure, however, to address an argument that petitioner failed properly to raise and that would have made it *more difficult* for petitioner to obtain relief (see Pet. 11) does not warrant this Court's review. In any event, the Board's failure to consider the waiver provision *sua sponte* does not present a question of broad or enduring legal importance that merits an exercise of this Court's certiorari jurisdiction.[2]

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[2] Petitioner also ignores the fact that the Board denied his motion to reopen on the alternative and independent ground that reopening would not be warranted as a matter of discretion. Pet. App. 7a. Because petitioner was placed in deportation proceedings before IIRIRA's general effective date of April 1, 1997, see IIRIRA § 309(a), 110 Stat. 3009-625, and because the Board's final order was issued after October 31, 1996, IIRIRA's transitional judicial-review provisions apply. See IIRIRA § 309(c)(1) and (4), 110 Stat. 3009-625, 3009-626. Section 309(c)(4)(E) of IIRIRA's transition rules provides that "there shall be no appeal of any

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2001

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discretionary decision under section * * * 245 of the Immigration and Nationality Act," 110 Stat. 3009-626. As the government argued in seeking dismissal by the court of appeals, that Section appears to bar judicial review of the Board's discretionary denial of petitioner's motion to reopen so that he could apply for relief under Section 245 of the Immigration and Nationality Act. See *Skutnik* v. *INS*, 128 F.3d 512, 514 (7th Cir. 1997) (finding no jurisdiction to review discretionary denial of suspension of deportation).